No. 93-377

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
*Petitioners,*
against
MILHELM ATTEA & BROS., INC.,
*Respondent.*

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York, *et al.*,
*Petitioners,*
against
ELIAS ATTEA, JR.,
*Respondent.*

**On Writ of Certiorari to the Court of Appeals of the State of New York**

## BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NEW YORK ASSOCIATION OF CONVENIENCE STORES, INDEPENDENT PETROLEUM MARKETERS OF NEW YORK, INC. AND SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS


**Page**

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICI CURIAE* ..... 2

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 6

A. The New York Regulations Are Not Preempted By The Indian Trader Laws ..... 7

1. This Court Has Repeatedly Upheld Similar Regulatory Schemes ..... 7

2. The Court Of Appeals' Decision Is Wrong ..... 10

B. The Regulations Impose Permissible Minimal Burdens On Indian Traders .. 11

C. The New York Regulations Should Be Upheld Because They Protect The Valid Interests Of *Amici* And Other Non-Indian Retail Businesses In Fair Competition ..... 13

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**Page**

### FEDERAL CASES

*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) . . 6, 7, 11, 13

*Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) . . . . . 6, 7, 9, 11

*Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965) . . . . . 7, 8

*Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) . . . . . passim

### STATE CASES

*Milhelm Attea & Bros., Inc. v. Department of Taxation*, 615 N.E.2d 994 (N.Y. 1993) . . . . . 10

### MISCELLANEOUS

New York Comp. Codes R. & Regs. tit. 20, § 335.6(f) and (g) . . . . . 12

New York Tax Law § 471(1) . . . . . 3



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The National Association of Convenience Stores, New York Association Of Convenience Stores, Independent Petroleum Marketers Of New York, Inc. and Society Of Independent Gasoline Marketers Of America submit this

brief as *Amici Curiae* in support of petitioners James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, and the Department of Taxation and Finance of the State of New York.[1/]

## INTEREST OF *AMICI CURIAE*

The National Association of Convenience Stores, founded in 1961, is a non-profit trade association representing nearly 1,500 retailers operating convenience stores throughout the United States. These retailers provide consumers with convenient locations to quickly purchase a wide array of products and services, including tobacco, soda, candy, baked goods and snack foods. Nearly 27 percent of the typical convenience store's merchandise sales are tobacco products. Consumers who initially go to these stores to buy tobacco products typically make additional impulse purchases of goods which they then recognize they need. The convenience stores rely heavily on these supplemental purchases. A significant number of convenience stores are located near Indian reservations. These stores are in direct competition with stores selling tobacco products on these reservations.

The New York Association of Convenience Stores is a non-profit corporation representing the collective interests of small retail businesses that sell cigarettes, petroleum and other products in New York. The Independent Petroleum Marketers of New York, Inc. is a non-profit corporation that represents the interests of small businesses that sell petroleum, cigarettes and other products, primarily at retail, in New York State. The Society of Independent Gasoline Marketers of America is a national trade association representing independent marketers and chain retailers of motor fuel in the United States, most of whom operate convenience stores in conjunction with their fuel outlets. Many of the businesses that these groups represent compete for retail sales of cigarettes to non-Indian consumers with businesses operated by Indians on reservations.

New York Tax Law § 471(1) imposes an excise tax on all cigarettes purchased in New York. The tax is paid by the purchase of stamps affixed to the cigarette packages as a precondition to the first taxable sale by a wholesaler or distributor. The tax is added to the selling price of the cigarettes along the distribution chain and is ultimately added to the retail price charged the customer. The members of the *Amici* collect these taxes from consumers on their retail sales of cigarettes.

Because Indians and Indian tribes are exempt from State taxation within their own territory, wholesale dealers may sell them unstamped cigarettes. These cigarettes are substantially cheaper than cigarettes purchased outside of the reservation. Non-Indian purchasers are required to pay the tax. However, it is well known that Indian sellers make no attempt to collect this tax from non-Indian purchasers. Consequently, many non-Indians travel to Indian reservations to buy unstamped cigarettes and avoid the sales tax. This widespread conduct threatens to destroy businesses near the reservations who depend upon purchases of tobacco and gasoline products to survive.

In an effort to prevent this pervasive evasion of the sales tax, the New York State Commissioner of Taxation

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1/ This brief is filed with the permission of the parties. Written consents have been provided to the Clerk of this Court.

and Finance adopted regulations designed to collect the tax from non-Indian purchasers. These regulations will also prevent Indian retailers from wrongfully using the tax exemption and unfairly competing with stores outside the reservations. Briefly, these regulations permit Indian retailers to purchase an unlimited number of taxed cigarettes, advancing the tax to their wholesale suppliers and recovering the tax from the non-Indian purchaser. The Indian retailers may also purchase untaxed cigarettes, for resale to Indians, in an amount equal to the approximate number of Indian consumers serviced by the retailer. The wholesalers selling to the Indian retailers are required to document their sales of untaxed cigarettes and collect "tax exemption coupons" issued by the State for every purchase of untaxed cigarettes by Indian retailers.

The *Amici* have a direct and vital economic interest in the enforcement of the New York regulations, and similar regulations throughout the country.[2/] Retailers represented by these associations compete with Indian retailers for retail sales of cigarettes to non-Indian consumers. Indian retailers have historically refused to collect the applicable State taxes on cigarettes sold to non-Indians and aggressively market their exemption from State taxation to non-Indian purchasers by selling cigarettes at inordinately low "discount" prices. These artificially low prices divert non-Indian purchasers away from the stores operated by non-Indian retailers near the reservations.

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2/ A list of other associations representing retailers across the country who compete with on-reservation Indian businesses for retail sales of cigarettes to non-Indian purchasers, and who urge this Court to reverse the decision of the New York State Court of Appeals, is set forth in the Appendix to this brief.



Non-Indian retailers lose significant revenue that would have been generated by their cigarette sales but for the Indian retailers' illegal discounts. In fact, retailers in New York, where the tax on cigarettes is currently 56 cents on every package of 20 cigarettes, and across the country lose millions of dollars in cigarette sales each year because of the unlawful competitive advantage Indian retailers create for themselves by refusing to collect the applicable State tax.

The low-cost prices on cigarettes offered by Indian retailers also seriously reduce the sales of other products sold by the *Amici's* members. Surveys indicate that the average cigarette smoker purchases cigarettes from convenience stores approximately three times per week. This is more than three times the number of visits per week by non-smokers. Moreover, as a result of the stores' convenient geographic locations and extensive inventory of goods, these cigarette smokers also purchase products such as soft drinks, newspapers, magazines, coffee and bakery items at the same time they purchase cigarettes. By offering discount prices on cigarettes, Indian retailers lure customers away from non-Indian retailers' stores and thereby decrease the amount of money these customers spend on cigarettes and other products. The stores' overall revenue level declines and their profitability weakens. In some cases, retailers located in close proximity to Indian retailers have been forced to go out of business because of this unfair competition.

*Amici* urge this Court to uphold the New York regulations to protect the rights of their members and enable them to compete on an equal basis with on-reservation Indian retailers. Unless the New York regulations are upheld, legitimate businesses who follow the

law will continue to face unfair and inequitable competition by Indian retailers who refuse to collect valid State taxes from non-Indian purchasers of cigarettes.

## SUMMARY OF ARGUMENT

The decision of the New York State Court of Appeals should be overruled, and the constitutionality of the New York regulations affirmed, because this Court's decisions in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), expressly authorize New York's regulations. Specifically, this trilogy of cases permits the State to require retail outlets selling cigarettes on Indian reservations and their wholesale suppliers to comply with regulations which (1) limit the quantity of untaxed cigarettes which Indian retailers may purchase; (2) require Indian retailers to advance a tax to their wholesale suppliers for the cigarettes purchased for resale to non-Indian consumers; and (3) impose minimal recordkeeping and reporting burdens on the retailers' wholesale suppliers.

## ARGUMENT

This Court has consistently held that states may impose a tax on non-Indian purchasers of cigarettes from Indian retail outlets, and may require the Indian retailers to assist in collecting the tax. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482-83 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151 (1980). Moreover, these cases hold that states can also require the *wholesaler suppliers* who sell cigarettes to these Indian retailers to comply with state



regulations whose purpose is to prevent non-Indian consumers from evading the state tax. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). *See also Colville*, 447 U.S. at 159-61. The decision by the New York Court of Appeals that New York's regulations directed at wholesale suppliers are preempted by the Indian trader laws and are unconstitutionally burdensome is flatly inconsistent with this Court's prior opinions.

### A. The New York Regulations Are Not Preempted By The Indian Trader Laws

#### 1. This Court Has Repeatedly Upheld Similar Regulatory Schemes

In *Moe*, the Court addressed a Montana law which required Indian sellers of cigarettes to collect a state sales tax imposed upon non-Indian cigarette purchasers. The tax scheme required the Indian seller to pay the tax to the wholesaler from whom it purchased the cigarettes, and then add the tax to the purchase price of the cigarettes for payment by the ultimate non-Indian purchaser. *Moe*, 425 U.S. at 482. The Court emphasized that nothing in the law "runs afoul of any congressional enactment dealing with the affairs of Indians" because the ultimate burden of the "tax" was on the non-Indian purchaser. *Id.* at 483. The Court distinguished *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), relied upon below by the Court of Appeals, on the ground that the 2% tax levied by the State of Arizona on gross sales by Indian traders to reservation Indians was imposed *directly* on such sales and not on the ultimate non-Indian consumer. The Court expressly approved a regulatory scheme which was merely a "minimal burden" on Indian retailers designed to prevent

non-Indian purchasers from avoiding a concededly lawful tax. *Id.*

The Court reaffirmed the principles announced in *Moe* four years later in *Colville*, and expressly sanctioned a state's power to require the assistance of Indian retailers *and* their wholesale suppliers to collect validly enacted state taxes from non-Indians purchasing cigarettes on the reservation. At issue in *Colville* was a Washington State law which imposed extensive recordkeeping requirements on the retailers' wholesale suppliers and required Indian retailers to collect a cigarette excise tax from non-Indian purchasers. The law was enacted to prevent Indian retailers from offering their own exemption from state taxation to non-Indian cigarette purchasers. Because the "legal incidence of the tax is on the . . . non-Indian buyer," *Colville*, 447 U.S. at 141-42, the Court found that the wholesaler/Indian retailer relationship was not impermissibly interfered with by the regulations. The Court specifically considered the impact of the Indian trader laws and rejected the preemption argument relied upon by the New York Court of Appeals:

> We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere.

*Id.* at 155. The Court went on to authorize the State to regulate the actions of the Indian retailers' wholesale suppliers by requiring the suppliers to keep detailed records regarding their taxable and nontaxable sales to Indian retailers. *Id.* at 160. Moreover, the Court even went so far



as to permit the State to seize untaxed cigarettes in transit from wholesalers if the Indian retailers refused to cooperate in the collection of State taxes. *Id.* at 161-62. There was not the slightest suggestion in this opinion that the Indian trader laws preempted these regulatory requirements.

In *Potawatomi*, the Court further solidified the principle that states may require Indian wholesale suppliers to assist in collecting valid state taxes. In that case, the State of Oklahoma sought to impose an assessment for $2.7 million in back taxes on cigarette sales against a convenience store owned and operated by the Potawatomi Tribe. The Tribe claimed that its sovereign immunity prevented the State from suing it directly to collect the back taxes. While the Court agreed with this position, as it did in *Moe* and *Colville*, the Court reaffirmed its earlier holdings that Indian retailers were not exempt from assisting the State with prospective tax collection: "Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Potawatomi*, 498 U.S. at 512. The Court specifically authorized states to require wholesalers to assist in collecting these taxes:

> And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or *by assessing wholesalers who supplied unstamped cigarettes to the tribal stores*.

*Id.* at 514 (emphasis added; citations omitted).

### 2. The Court Of Appeals' Decision Is Wrong

The decision of the New York State Court of Appeals is in direct conflict with *Moe*, *Colville* and *Potawatomi*. The lower court relied upon this Court's prior decision in *Warren Trading Co.* for its conclusion that the New York regulations are preempted by the federal Indian trader laws. The Court of Appeals held that despite the express language of *Potawatomi* permitting states to require wholesalers to assist in the collection of taxes, such language "did not alter the established rule stated in *Warren Trading Post v. Tax Commission* that Congress has taken the matter of regulating Indian trades so fully in hand . . . because it cites none of the relevant decisions in this area." *Milhelm Attea & Bros., Inc. v. Department of Taxation*, 615 N.E.2d 994, 1001 (N.Y. 1993). The Court of Appeals totally ignored the fact that *Warren* involved a sales tax that was levied directly on the Indian retailer. Here, the ultimate burden of the tax is indisputably on the non-Indian consumer. *Moe*, *Colville*, and *Potawatomi* authorize the State to require Indian wholesalers to assist in the collection of the excise taxes under these circumstances.

The lower court further held that this Court's statement in *Potawatomi* only meant that the "remedy" of imposing a tax directly on wholesalers could only be employed retroactively to collect unpaid taxes on past cigarette sales. This distinction makes no sense. If the Indian trader laws, or any federal law governing Indian affairs, preempt states from exercising regulatory authority over Indian traders in their dealings with Indian customers, it is irrelevant that the state seeks to exercise its authority prospectively or retrospectively. *Any* exercise of authority would be preempted. Because *Potawatomi* approves of the



State's right to collect taxes from Indian retailers by requiring wholesale suppliers to assist in the process, the Court of Appeals should be reversed.

### B. The Regulations Impose Permissible Minimal Burdens On Indian Traders

State regulations that require Indian retailers and their wholesale suppliers to assist in the collection of valid state taxes are permissible if they are not unreasonably burdensome. *Moe*, 425 U.S. at 483; *Colville*, 495 U.S. at 159-60. In *Moe*, the Court characterized the requirement that Indian retailers collect the tax as a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe*, 425 U.S. at 483. While *Moe* did not discuss whether such a "minimal burden" could be imposed on the Indians' wholesale suppliers, a point seized upon by the Court of Appeals, there is no reason to make a distinction between retailers and wholesalers. In *Potawatomi*, the Court authorized the imposition of burdens on wholesalers supplying Indian retail outlets in order to secure the collection of valid state cigarette taxes. *Potawatomi*, 495 U.S. at 514. This is in contrast to the Court of Appeals' conclusion that every transaction between an Indian tribe and its supplier may not be regulated by the states.

Nonetheless, the Court of Appeals held that the New York regulations impermissibly place "significant" burdens on wholesalers. But the Court of Appeals gave no justification for this extraordinary conclusion. The challenged New York regulations, as applied to wholesalers, are limited in scope: they merely require that cigarette distributors making tax free sales of cigarettes to

businesses located on Indian reservations keep accurate records of their sales, keep a copy of the businesses' tax exemption certificates, and verify their sales to Indian retailers by forwarding tax exemption coupons issued by the State to the Department of Taxation and Finance. New York Comp. Codes R. & Regs. tit. 20, § 335.6(f) and (g). In contrast, the *Colville* Court approved much more arduous recordkeeping requirements which mandated that Indian retailers (1) record the number and dollar volume of taxable sales to nonmembers of the tribe; (2) with respect to nontaxable sales, record the names of all Indian purchasers, their tribal affiliations, the reservations within which the sales are made, and the dollar amount and dates of the sales; and (3) review each Indian purchaser's tribal identification card unless the purchaser is personally known to the retailer. *Colville*, 447 U.S. at 159-61.

The Court in *Colville* noted that the Indian retailers failed to present any evidence as to whether the requirements of the Washington law were overly burdensome. The Court accordingly held that the tribes failed to meet their burden of showing that the challenged tax scheme was not reasonably necessary as a means to prevent non-Indian consumers from evading taxes. *Id.* at 160. Likewise, the respondents in this case failed to present any evidence on the issue of burden, or any evidence showing that the regulations in issue were not reasonably necessary to prevent similar tax evasion in New York. Under these circumstances, the Court of Appeals erroneously determined that the New York law overstepped the boundaries of acceptable state regulation.



### C. The New York Regulations Should Be Upheld Because They Protect The Valid Interests Of *Amici* And Other Non-Indian Retail Businesses In Fair Competition

The New York regulations in question should be upheld to prevent unfair competition between Indian and non-Indian retailers selling cigarettes and other consumer goods. As previously mentioned, Indian retailers historically have refused to collect valid state taxes on sales of cigarettes to non-Indian purchasers.[3/] This is done intentionally to enable Indian retailers to market their exemption from state taxes to non-Indian purchasers, who enjoy no such exemption, and sell cigarettes at unnaturally low prices. Both *Moe* and *Colville* recognized that Indian retailers selling untaxed cigarettes to non-Indian consumers realize an artificial competitive advantage over non-Indian retailers who are required to collect the tax. *See Moe*, 425 U.S. at 482; *Colville*, 447 U.S. at 154-56. However, the Court in *Colville* specifically stated that such actions are prohibited: "None of the federal laws concerned with fostering tribal economic development goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." *Colville*, 447 U.S. at 155.

The failure of Indian retailers to collect taxes on cigarette sales to non-Indians prevents non-Indian retailers with businesses near the reservation from effectively competing for such sales. Because *Amici's* members collect

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3/ Indian tribes often attempt to justify these actions by referring to their need to foster economic development and generate revenue for "essential governmental programs." *Colville*, 447 U.S. at 154.

all applicable State taxes on cigarettes, they simply cannot match the Indian retailers' bargain prices. These discount sales by Indian retailers to non-Indians deprive the retailers in New York and across the country of millions of dollars annually in cigarette sales that they might make but for the Indian retailers' artificially low prices.[4/] The New York regulations would compel Indian retailers to collect the State tax on cigarette sales to non-Indians, and thereby prevent the retailers from "marketing" their tax exemption to non-Indian consumers who would normally purchase cigarettes elsewhere.

The artificially low prices offered by Indian retailers also deprive retailers of the ancillary revenue generated by the sales of products non-Indian consumers purchase at the same time they buy cigarettes. Data indicates that cigarette smokers purchase cigarettes from convenience stores approximately three times per week. Moreover, these purchasers make more than three times the number of trips to convenience stores per week than do non-smokers. As a result of the stores' geographic convenience and purchasing ease, these consumers also tend to spend additional money on soft drinks, newspapers, magazines, coffee and bakery items each time they purchase cigarettes. By offering cigarettes to non-Indian consumers at bargain prices, Indian retailers wrongly divert customers away from convenience stores which do comply with the law. This results in a dramatic decrease in the volume of sales for the non-Indian retailers. In some cases, retailers who operate convenience stores near retail outlets on Indian

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4/ Recent decisions by supermarkets, drugstores and other retail entities to decrease their sales of tobacco products mean that convenience stores are often a consumer's only source for cigarettes.



reservations have closed their stores due to their low volume of business.

In sum, Congress never intended for Indian retailers to reap the windfalls that arise from their repeated sales of untaxed cigarettes to non-Indian purchasers. This Court should not perpetuate this unfairness by voiding New York's appropriate procedures to collect its taxes.

## CONCLUSION

For the foregoing reasons, the *Amici* urge this Court to reverse the decision of the New York State Court of Appeals and affirm the constitutionality of the New York regulations in question.

Respectfully submitted,

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# APPENDIX

## APPENDIX

Arizona Petroleum Marketers Association

Arkansas Grocers & Retail Merchants Association

Georgia Oilmen's Association

Minnesota Service Station Association

Missouri Petroleum Marketers Association/
Missouri Association of Convenience Stores

Montana Petroleum Marketers Association

New England Convenience Store Association

New Mexico Petroleum Marketers Association

North Dakota Petroleum Marketers Association

Retail Grocers Association of Arizona

Retail Grocers Association of Florida

Washington Oil Marketers Association